

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

North County Communications Corporation,)	
)	
Complainant,)	
)	
vs.)	Docket No. 02-0147
)	
Verizon North Inc. and Verizon South Inc.,)	
)	
Respondent.)	

VERIFIED MOTION TO STRIKE OF
VERIZON NORTH INC. AND VERIZON SOUTH INC.

Verizon North Inc. and Verizon South Inc. (collectively "Verizon") by and through their attorneys, hereby respectfully move, pursuant to §200.190 of the Commission's Rules of Practice, 83 Ill. Adm. Code §200.190, to strike improper and inadmissible portions of North County Communications' ("NCC's") pre-filed testimony in this proceeding. In support of this Motion, Verizon states as follows:

I.
Introduction

The pre-filed testimonies of NCC witnesses Mr. Todd Lesser and Mr. Doug Dawson contain numerous statements and exhibits that must be stricken and excluded from the record in this proceeding. Most of the statements address matters that are entirely beyond the scope of the Commission's jurisdiction and cannot be heard in any hearing conducted under the authority vested in the Commission. In addition, Mr. Lesser improperly testifies to his unfounded and biased opinions on the evidence in this proceeding, and Mr. Dawson attempts to introduce inadmissible materials as the basis for his expert opinions. The testimonies also contain numerous assertions that are entirely speculative and are replete with statements that constitute blatant hearsay. Finally, Mr. Lesser improperly seeks to introduce testimony and exhibits

pertaining to alleged settlement negotiations¹ between NCC and Verizon's West Virginia affiliate.

Overall, the statements and exhibits proffered by NCC's witnesses are unreliable and unverifiable; and the introduction of these items into evidence can, therefore, serve no legitimate purpose. The sanctity of the record must be protected from the introduction of such materials and the undue prejudice that would definitively result. The testimony and exhibits identified herein must be stricken.

II. **Argument**

A. Matters beyond the Commission's Jurisdiction must be excluded from the Record.

NCC appears to rest its case in large part on events that NCC alleges to have taken place outside of Illinois. The testimonies of NCC's witnesses consist substantially of allegations against Verizon's affiliates in other states, namely West Virginia, New York and Maryland, and certain portions of the testimony that has been submitted in proceedings brought against Verizon's affiliates in those states. Such allegations and testimony cannot constitute any basis for the Commission's findings with respect to Verizon in Illinois. The Commission has no jurisdiction over such out-of-state matters, and may not engage in any fact-finding process to determine the veracity of NCC's allegations with respect to Verizon's out-of-state affiliates or the claims set forth in the testimony proffered in the non-jurisdictional proceedings. NCC's proffered testimony and exhibits that constitute allegations against Verizon's out-of-state affiliates and testimony proffered in non-jurisdictional proceedings must be stricken.

¹ As explained *infra*, Verizon's West Virginia affiliate interpreted NCC's letter to Verizon's counsel in West Virginia to be a demand letter rather than an offer of settlement.

1. The Commission's Jurisdiction is limited to Illinois.

The Commission is a creature of statute whose authority over telecommunications carriers is limited to Illinois. 220 ILCS 5/4-303 (providing that the Public Utilities Act ("Act"), and thus the Commission's authority derived therefrom, does not "apply to ... commerce among the several states of the Union"). Thus, the Commission is not vested with authority over interstate matters, i.e., with diversity jurisdiction (as are federal courts), or with authority over any matter occurring in any state other than Illinois. As such, the Commission does not have the authority to decide the truth of any claims raised regarding a carrier operating in a state other than Illinois. This is so irrespective of whether the out-of-state carrier is affiliated with a carrier that operates in Illinois, such as Verizon.

2. Non-Jurisdictional Allegations and Testimony are Unreliable Bases for Commission Decisions.

Claims that fall outside of the Commission's jurisdiction, whether set forth in out-of-state testimony or merely by allegations, cannot be examined for truth and reliability in Illinois. More specifically, the Commission does not have authority to hold hearings and take evidence on out-of-state issues. In the absence of conducting a full evidentiary proceeding in regard to out-of-state claims, the Commission can not make any findings as to the veracity of the allegations or the testimony that supports the claims. In the absence of such an evidentiary process, the unexamined claims can not rise above the status of unproven allegations. Unproven allegations simply are not reliable bases for factual findings.

This point bears emphasis with respect to non-jurisdictional testimony. The assertions made in non-jurisdictional testimony are not definitely true simply because a witness has placed his/her name on the testimony. While NCC seeks to introduce bits and pieces of non-jurisdictional testimony for the Commission's consideration in this proceeding, the records in the out-of-state proceedings are significantly more voluminous. Verizon's affiliates contested

NCC's claims in the other jurisdictions, and presented substantial evidence that is contrary to NCC's allegations. The Commission would need to evaluate the entirety of the out-of-state records before the Commission could even begin to understand whether NCC's proffered pieces of testimony are supported by the substantial weight of evidence taken in the out-of-state proceedings. Even then, the Commission (and, in particular, the ALJs) would be disadvantaged because the opportunity to assess the witnesses' demeanors during live cross-examination in the non-jurisdictional proceedings has already been missed. Therefore, even if the Commission had the authority to make findings with respect to out-of-state issues, which it does not, the Commission is not in a position to do so because the Commission is not privy to the substantial amount of opposing evidence contained in the records of the non-jurisdictional proceedings.

Indeed, the point that the veracity of non-jurisdictional testimony and allegations cannot be known in the absence of an evidentiary proceeding is driven home with an example that is directly applicable to the pieces of testimony NCC seeks to introduce here. In particular, both Mr. Lesser and Mr. Dawson seek to introduce the testimony of the West Virginia Staff witness Mr. Walker who testified that Verizon's affiliate in West Virginia adopted an "unwritten policy" that obstructed and delayed CLEC entry into the market. (Lesser Direct, pp. 20-21; Dawson Direct, p. 22; NCC Exhibit M). In part through his admitted reliance on the out-of-state testimony of Mr. Walker, Mr. Dawson also alleges that "[i]n those states [i.e., West Virginia, New York and Maryland] Verizon really did have a policy to not allow a CLEC to interconnect on a facility that was already being used by a retail customer." (Dawson Rebuttal, pg. 7, ln. 28, pg. 8, ln. 1). However, based on the full evidentiary record developed in the West Virginia proceeding, the West Virginia Commission found that Verizon's West Virginia affiliate **did not** have the "policy" testified to by West Virginia Staff witness Mr. Walker or alleged by Mr. Dawson. *NCC v. Verizon West Virginia*, Case No. 02-0254-T-C, slip op. at 32 (Aug. 28, 2003).

The West Virginia Commission rejected the very testimony and allegations that NCC would like the Commission to rely upon in this proceeding. Clearly, the West Virginia Commission's contrary finding demonstrates conclusively that non-jurisdictional testimony and allegations are unreliable to establish the truth of the matters asserted.

The Commission must not permit into evidence and rely upon the non-jurisdictional testimony and allegations that NCC seeks to introduce. The Commission has not received evidence concerning the issues raised in other states nor would the Commission have the jurisdiction to make determinations with respect to such non-jurisdictional issues even if access to the full evidentiary records from those jurisdictions were available. The jurisdiction to make such determinations rests properly with the other state commissions and courts that are hearing the cases in those states. NCC's allegations and testimony against Verizon's affiliates in other jurisdictions are, therefore, inherently unreliable for purposes of this proceeding and must not form any basis of the Commission's decision in Illinois.

3. Non-Jurisdictional Allegations and Testimony are unduly prejudicial.

Given the lack of Commission authority over non-jurisdictional claims and the Commission's resultant inability to examine such claims for truth and veracity through an evidentiary process, the admission of non-jurisdictional testimony and allegations into evidence can serve no legitimate purpose. The Commission cannot base any factual findings on such unreliable, unverified and un-probative items. On the other hand, a substantial risk exists that the admission of non-jurisdictional testimony and allegations would unduly prejudice the record. Such a risk of undue prejudice must not be run when no legitimate purpose can be accomplished by these materials' admission.

Accordingly, NCC's allegations against Verizon's affiliates in West Virginia, New York and Maryland and the testimony proffered in non-jurisdictional proceedings must be stricken

from the record. Verizon respectfully requests that the following portions of Mr. Lesser's and Mr. Dawson's testimonies be stricken on this basis:

Allegations against Out-of-State Affiliates

LESSER DIRECT

Page 3 Line 25 beginning ", and in every" and ending "to interconnect,"

Page 4 Line 5 through Line 6 ending "here in Illinois."

Page 4 Line 19 beginning "with respect to" through Line 21

Page 6 Line 8 through Page 10 Line 14

Page 10 Line 23 beginning ", before the" through Line 24 ending "and here,"

Page 10 Line 26 through Page 13 Line 23

Page 13 Line 27 beginning "There was" through Page 15 Line 11

Page 15 Line 23 through Page 16 Line 19

Page 18 Line 5 through Line 10

Page 18 Line 17 through Page 20 Line 2

Page 21 Line 15 through Line 21 ending "entities."

Exhibit A

Exhibit B

Portions of Exhibit C: -001 through -027, -031, -037

Exhibit D

Exhibit E

Portions of Exhibit G: Page 1 Response to Request No. 3 in West Virginia

Exhibit H

DAWSON DIRECT

Page 8 Line 23 through Page 9 Line 16 ending "BellSouth,"

Page 11 Line 19 through Line 25

Page 18 Line 10 beginning “In light” through Line 11 ending “West Virginia,”

Page 20 Line 12 beginning “In light” though Line 13 ending “West Virginia,”

Page 21 Line 13 through Line 18

LESSER REBUTTAL

Page 7 Line 17 beginning “In each jurisdiction” through Line 18 ending “each case.”

Page 7 Line 26 through Page 8 Line 9

Page 9 Line 24 beginning “She has” through “conversations.”

Page 17 Line 10 beginning “Verizon is” through Line 12 ending “sending us.”

Page 17 Line 17 through Line 21

Page 20 Line 20 through Line 25

Page 24 Line 15 through Line 24

Page 26 Line 25 through Line 28 ending “dedicated MUX.”

Page 28 Line 26 beginning “NCC marketed” through Line 28 ending “mistake twice.”

Page 32 Line 16 beginning “It is also” through Line 18 ending “letter.”

Portions of Exhibit P: -018 through -020, -023 through -036

Exhibit S

Exhibit T

DAWSON REBUTTAL

Page 6 Line 17 beginning “One has” through Line 19 ending “customers.”

Page 7 Line 9 beginning “He asked” through Line 11 ending “his location.”

Page 7 Line 20 through Page 8 Line 2 ending “states, but”

Page 9 Line 5 beginning “However,” through Line 8 ending “this hearing.”

Testimony proffered in Non-Jurisdictional Proceedings

LESSER DIRECT

Page 10 Line 15 through Line 18

Page 15 Line 17 through Line 22

Page 17 Line 6 through Line 28

Page 18 Line 17 through Line 20

Page 19 Line 2 beginning "In fact," through Line 10

Page 20 Line 3 beginning "Did you" through Page 21 Line 24

Exhibit F

Exhibit I

Exhibit J

Exhibit K

Exhibit L

Exhibit M

Exhibit N

Exhibit O

DAWSON DIRECT

Page 21 Line 5 through Page 22 Line 17

Exhibit L

Exhibit M

LESSER REBUTTAL

Page 1 Line 27 beginning "My interconnection" through Page 2 Line 4

Page 2 Line 8 beginning "However," through Line 11 ending "shared facility."

Page 6 Line 11 beginning "what the staff" through Line 12 ending "raised;"

Page 7 Line 18 beginning “In the Core” through Line 24

Page 18 Line 26 beginning “In West Virginia” through Line 28 ending “same position.”

Page 23 Line 21 beginning “Second,” through Line 27 ending “Correct.”

Page 24 Line 5 through Line 6

Exhibit Q

Exhibit R

Exhibit U

Exhibit W

B. Allegations of the Non-Payment of Reciprocal Compensation are Irrelevant to NCC's Complaint in Illinois.

Mr. Lesser asserts that Verizon has not paid NCC reciprocal compensation for the traffic that Verizon has sent NCC. (Lesser Rebuttal, pg. 17, ln. 11-21). These allegations do not pertain to Illinois and must be stricken from the record.

First, NCC did not set forth a claim for reciprocal compensation in its Complaint in Illinois. Accordingly, these allegations are beyond the scope of NCC's Complaint.

Second, no local traffic has passed over NCC's interconnection with Verizon in Illinois with the exception of test traffic since the interconnection's completion over a year ago. (Allison Direct, p. 45; NCC's Responses to TL-2.16 and VZ-NCC 5.15 attached hereto as Exhibit A). The lack of any material change with respect to this fact is verified by this Verified Motion. Mr. Lesser cannot seriously claim that NCC is entitled to reciprocal compensation payments when no traffic upon which such payments could potentially be based has even flown over NCC's interconnection in Illinois.

Third, Mr. Lesser's assertion that he has been forced to take Verizon to arbitration or court in Illinois, (*see*, Lesser Rebuttal, pg. 17, ln. 21 (stating “in all states”), over reciprocal

compensation payments is simply not true. NCC has not filed any action with the Commission or any Illinois court over the issue of reciprocal compensation.

Accordingly, not only is Mr. Lesser's assertion that reciprocal compensation payments are due in Illinois beyond the scope of NCC's Complaint, no factual basis could exist for such an assertion because no traffic that could potential entitle NCC to reciprocal compensation payments has flown over NCC's interconnection in Illinois. Verizon respectfully requests that the following portions of Mr. Lesser's testimony be stricken on this basis:

LESSER REBUTTAL

Page 17 Line 11 beginning "They are" through Line 12 ending "sending us."

Page 17 Line 17 through Line 21

Page 24 Line 17 beginning ", they aren't" and ending "Oregon"

C. Hearsay must be excluded from the Record.

Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, that is offered in evidence to provide the truth of the facts asserted. *See*, Lempert and Saltzburg, *A Modern Approach to Evidence*, p. 356 (2nd Ed. 1983). In other words, hearsay is evidence not proceeding from the personal knowledge of the witness, but from the mere repetition of what the witness has heard others say. I.L.P. Evidence §111 (*quoted in*, *People v. Ingersoll*, 208 N.E.2d 79, 58 Ill.App.2d 216 (1965)). Hearsay presents four main dangers that arise from the inability of the adverse party to examine the declarant about the statement at the time the statement was made: (1) ambiguity, (2) insincerity, (3) incorrect memory, and (4) inaccurate perception. Lempert and Saltzburg, p. 351. In addition, a fifth danger exists with respect to the in-court witness who is repeating the out-of-court statement – namely, the potential for a mistake in the transmittal of the statement. *Id.*, p. 353. Thus, the

hearsay exclusionary rule applies regardless of the declarant's availability as a witness.² If a statement is hearsay and no exception to the rule is applicable, the statement *must* be excluded upon objection to its admission. I.L.P. Evidence §111; *see also, J.L. Simmons Co. v. Firestone Tire & Rubber Co.*, 483 N.E.2d 273, 108 Ill.2d 106 (1985).

All of the out-of-court statements that were allegedly made in the course of NCC's interconnections with Verizon's out-of-state affiliates are hearsay and must be excluded. While some (but certainly not all) of the declarants of out-of-court statements made in relation to NCC's interconnections in other states may be witnesses in this proceeding, the examination that must be afforded to overcome the hearsay exclusionary rule must be of the hearsay statement. As explained *supra*, however, the Commission does not have jurisdiction over NCC's claims against Verizon's out-of-state affiliates. The Commission does not, therefore, have the authority to conduct an examine into the circumstances that surrounded any out-of-court statements made during the course of NCC's interconnections in other states. It is and will remain unknown in this proceeding whether reasonable explanations exist for any out-of-court statements allegedly made in relation to NCC's interconnections with Verizon's out-of-state affiliates.³ The Commission must strike hearsay statements related to NCC's out-of-state interconnections because an opportunity to examine the declarants in relation to those out-of-court statements is not presented in Illinois.

The alleged hearsay statements related to NCC's interconnections with Verizon's out-of-state affiliates proffered by Mr. Lesser and Mr. Dawson in this proceeding must be stricken. Verizon respectfully requests that the following portions of Mr. Lesser's and Mr. Dawson's testimonies be stricken on this basis:

² Indeed, several exceptions to the hearsay rule apply only when the declarant is *unavailable* as a witness.

³ For example, it is possible that the physical infrastructures of Verizon affiliates in the former Bell Atlantic areas dictate different interconnection parameters.

LESSER DIRECT

Page 10 Line 2 through Line 5

Page 10 Line 8 through Line 14

Page 15 Line 3 through 7

Page 15 Line 23 through Page 16 Line 16

Page 18 Line 1 through Line 10

Portions of Exhibit C: -009, -010, -011, -031, -037

LESSER REBUTTAL

Page 1 Line 27 beginning “My interconnection” through Line 28 ending “so fast.”

1. Inferences from Silence also constitute Hearsay and must be excluded.

NCC's witness Mr. Lesser seeks to have the Commission imply that certain of NCC's allegations are true from the out-of-court silence of some Verizon employees. For example, Mr. Lesser claims that Verizon Illinois must have the policy NCC alleges because the attorneys representing Verizon's affiliate in West Virginia did not tell NCC that Verizon Illinois does not have the alleged policy during what NCC asserts to have been settlement negotiations in West Virginia.⁴ This is classic hearsay - NCC infers from silence that the alleged policy exists, and seeks to use the silence to prove the truth of the matter asserted, i.e., the existence of the alleged policy. Indeed, all of the dangers inherent in hearsay are present in NCC's inference, the highest of which is the extreme risk of ambiguity. Verizon's attorneys' silence with respect to Illinois during what NCC characterizes as settlement negotiations in West Virginia very likely had nothing to do with the existence of the alleged policy in Illinois. Rather, it is most likely that Illinois was not addressed because the correspondence concerned West Virginia. Accordingly,

⁴ As explained *infra*, Verizon's West Virginia affiliate did not interpret the correspondence NCC refers to as settlement negotiations in West Virginia. However, given NCC's own characterization of this correspondence as settlement negotiations, Verizon moves *infra* to exclude NCC's testimony regarding the correspondence from the record in this proceeding.

Mr. Lesser's assertions that inferences should be drawn from Verizon's silence in certain situations must be excluded.

Verizon respectfully requests that the following portions of Mr. Lesser's testimony be stricken on this basis:

LESSER REBUTTAL

Page 8 Line 3 beginning "Not one" through Line 4 ending "accurate."

Page 13 Line 24 through Page 14 Line 4

Page 19 Line 23 through Line 28

2. Implications based on Non-Assertive Conduct are Hearsay.

NCC's witness Mr. Lesser testifies an implication that Verizon's act of completing NCC's interconnection in Illinois at a point in time subsequent to when NCC filed its Complaint in Illinois implies that Verizon Illinois had the policy NCC alleges but abandoned the policy because NCC filed a Complaint. (*See e.g.*, Lesser Rebuttal, p. 2, ln. 2-4). Once again, this is classic hearsay. NCC sets forth the implication to prove the truth of the matter asserted, which is, once again, the existence of an alleged policy. The out-of-court, non-assertive conduct on which NCC urges the Commission's reliance suffers from all of the significant dangers inherent in hearsay. As with silence, the most important danger that exists is ambiguity. Indeed, the risk of ambiguity is greater than with verbal hearsay. A person who makes a verbal statement normally tries to make himself clear. But a person who takes a certain action that is not intended to communicate anything to others is, by definition, not interested in clarity of communication.

In this case, the fact that Verizon undertook the non-assertive conduct of completing NCC's interconnection after NCC filed its Complaint should not give rise to the implication NCC asserts. NCC filed its Complaint very early - approximately one (1) week after the parties' interconnection agreement in Illinois became effective. While Verizon would have completed

NCC's interconnection regardless of whether NCC filed its Complaint, it is notable that Verizon's conduct does not indicate in and of itself why the conduct was undertaken. NCC must not be permitted to rely on this ambiguity to imply that Verizon had alleged policy. NCC's statements setting forth this implication are hearsay and must be stricken.

Verizon respectfully requests that the following portions of Mr. Lesser's testimony be stricken on this basis:

LESSER DIRECT

Page 10 Line 23 through Line 25

LESSER REBUTTAL

Page 2 Line 2 through Line 4

Page 2 Line 22

Page 6 Line 6

Page 13 Line 15 beginning "It took" and ending "suit."

3. Former Testimony submitted in Non-Jurisdictional Proceedings is Hearsay.

NCC's witnesses seek to introduce select portions⁵ of the testimony previously submitted in out-of-state proceedings by persons who are both witnesses in this proceeding, such as Ms. McKernan, as well as persons who are not witnesses in this proceeding, such as West Virginia Staff witness Mr. Walker. The rationale for excluding the testimonies that were filed in out-of-state proceedings as hearsay holds. An opportunity to examine the declarants with respect to their out-of-state testimony in this Illinois proceeding does not exist. As explained *supra*, the issues presented in the non-jurisdictional proceedings are beyond the Commission's authority to hear or investigate. Moreover, with respect to the persons who testified on behalf of third parties

⁵ As NCC's witnesses only seek to introduce select portions of out-of-state testimony, it can be certain that any other portions of these testimonies that even slightly support of Verizon's position have been deleted from the material provided by NCC.

in the out-of-state proceedings, such as West Virginia Staff witness Mr. Walker or Maryland Staff witness Mr. Molnar, the lack of such persons' presence as witnesses in this proceeding creates another practical problem to their examination with respect to their out-of-state testimonies. Accordingly, the portions of testimony from out-of-state proceedings that NCC's witnesses seek to introduce must be excluded as hearsay from the record in this proceeding.

The portions of Mr. Lesser's and Mr. Dawson's testimonies that Verizon respectfully requests be stricken on this basis are identified *supra* at pages 8 - 9 of this Motion.

4. Other Hearsay must be excluded.

In addition to the main categories of hearsay addressed *supra*, there are other areas where Mr. Lesser seeks to submit hearsay to support NCC's position. Namely, Mr. Lesser seeks to submit a statement allegedly made by a Commission Staff employee, Mr. Bob Koch, that Mr. Koch assertedly made after hearing NCC's allegations against Verizon Illinois -- all without the benefit of any Verizon response. Verizon respectfully requests that Mr. Koch's hearsay statements must be stricken:

LESSER REBUTTAL Page 12 Line 5 through Line 8

In addition, Mr. Lesser sets forth allegations respecting Verizon's interconnections with two (2) third party carriers, namely Delta Communications and Globaleyes Tel. Inc. (*See*, Lesser Rebuttal, pg. 22, ln. 18 - pg. 23 ln. 10). Mr. Lesser was not involved in Verizon's interconnections with these third party carriers but nonetheless claims that these carriers have experienced delays that are Verizon's fault. As an outsider, Mr. Lesser can have no personal knowledge of these third parties' interconnections.⁶ At the most, Mr. Lesser can only be repeating hearsay without even disclosing the identity of the declarant. Notably, despite Mr.

⁶ Given Mr. Lesser's lack of any involvement in these third party interconnections, Verizon also moves to strike these statements *infra* because the statements are not based on Mr. Lesser's own personal knowledge.

Lesser's allegations, neither carrier has filed a complaint. Mr. Lesser's allegations regarding these third parties' interconnections must be stricken:

LESSER REBUTTAL

Page 22 Line 18 through Page 23 Line 10

Page 28 Line 26 beginning "Probably" and ending "Received."

Page 28 Line 28 beginning "NCC would" through Page 29 Line 3 ending "to perform."

Finally, Mr. Lesser seeks to introduce an article written by a Mr. Fred Vogelstein to prove the matters asserted in Mr. Vogelstein's article. (Lesser Rebuttal, p. 24, ln. 12-13). A clearer example of hearsay would be hard to find. Verizon respectfully requests that the following portions of Mr. Lesser's testimony be stricken on this basis:

LESSER REBUTTAL

Page 24 Line 12 beginning "I" through Line 13

Portions of Exhibit P: -032 through -035

D. Opinions proffered by NCC Witness Mr. Lesser must be stricken.

A basic premise of our legal system is that ordinary lay (non-expert) witnesses must limit their testimony to facts of which they have first-hand, personal knowledge and that it is only within the authority of the trier-of-fact to draw conclusions. Cleary, *McCormick on Evidence*, p. 23 (3rd Ed. 1984). Accordingly, opinion testimony by lay witnesses is generally inadmissible, as are assertions for which the witnesses do not have personal knowledge.

Initially, the fact that Mr. Lesser sets forth testimony on matters in which he has no personal knowledge is clearly seen through a single example. As noted *supra*, Mr. Lesser asserts that certain third party CLECs allegedly experienced problems in their interconnections with Verizon. (See, Lesser Rebuttal, pg. 22, ln. 18 - pg. 23 ln. 10). Mr. Lesser, however, was not involved in those third-parties' interconnections with Verizon, nor could Mr. Lesser have any

first hand knowledge of what transpired during those interconnections. Mr. Lesser's testimony to matters that are not within his personal knowledge must be stricken.⁷

Mr. Lesser also repeatedly testifies to his opinions and conclusions on issues in this proceeding despite the evidentiary restrictions on such testimony. Many of these opinions are expressed despite Mr. Lesser's lack of any personal knowledge regarding the opined matters, such as Mr. Lesser's opinions on the referenced third party interconnections. Mr. Lesser's opinions are, furthermore, the result of his own biased inferences, designed simply to support his claims in this proceeding, and unhelpful to the resolution of this proceeding based on the facts. While Mr. Lesser is certainly free to testify to facts within his personal knowledge, Mr. Lesser is prohibited from setting forth asserted conclusions that are really nothing more than his biased expressions. Mr. Lesser's repeated offenses in this regard serve no purpose other than to confuse the factual record and harm the evidentiary process. Rather than permitting Mr. Lesser to pepper the record with such testimony, it should be left for the ALJs and, ultimately, the Commission to draw their conclusions based on all the facts in evidence.

Mr. Lesser's statements of opinion and statements for which he has no personal knowledge, which are peppered throughout his testimony, must be stricken. Verizon respectfully requests that the following portions of Mr. Lesser's testimony be stricken on this basis:

LESSER DIRECT

Page 5 Line 20 through Page 6 Line 3 ending "Utilities Act."

Page 18 Line 27 beginning "I was" through Page 19 Line 2 ending "built."

Page 20 Line 13 beginning "Verizon's" through Line 14 ending "policy"

Page 20 Line 23 beginning "Troubled" and ending "unwritten policies,"

Page 21 Line 23 beginning "If it wasn't" through Line 24

⁷ Verizon also moves *supra* to strike Mr. Lesser's testimony regarding these third party interconnections as hearsay.

LESSER REBUTTAL

Page 1 Line 7 through Line 8 ending “fraud.”

Page 2 Line 2 beginning "When it" through Line 4

Page 8 Line 4 beginning "Verizon corporate" through Line 5 ending "behavior."

Page 8 Line 19 beginning "It is not" through Line 20 ending "equipment."

Page 8 Line 25 beginning "Someone" through Line 27 ending "believable."

Page 8 Line 28 beginning "they wouldn't" through Page 9 Line 1 ending "testified."

Page 9 Line 4 through Line 19

Page 10 Line 3

Page 14 Line 26 beginning ", she was" and ending "'work'"

Page 17 Line 27 through Page 18 Line 4

Page 18 Line 12 beginning “Instead” through Line 21

Page 18 Line 28 beginning “In Illinois” through Page 19 Line 4

Page 22 Line 11 through Line 16⁸

Page 22 Line 18 through Page 23 Line 10

Page 23 Line 20 beginning “That is” and ending “fabrication.”

Page 23 Line 29 beginning “Verizon National” through Page 24 Line 1 ending “jurisdictions”⁹

Page 24 Line 4 beginning “The rules” and ending “their rules.”

Page 25 Line 15 beginning “I don’t” through Line 20 ending “this case.”¹⁰

Page 27 Line 2 beginning “As long” through Line 4 ending “unreasonable.”

Page 27 Line 8 beginning “As long” through Line 9 ending “facility,”

⁸ Note that Ms. Allison has been retained by and is testifying on behalf of Verizon as an expert in this proceeding and, thus, it is legally appropriate for Ms. Allison to state her opinions for the Commission’s consideration. Mr. Lesser, on the other hand, as a lay witness in this proceeding is subject to the exact criticisms he levies at Ms. Allison.

⁹ As no basis exists for this opinion of Mr. Lesser, Verizon also moves *infra* to strike this statement as speculative.

¹⁰ Reference footnote 6. In addition, Mr. Lesser’s statements regarding the materials that he believes Ms. Allison reviewed in preparation for this proceeding are entirely speculative.

Page 28 Line 15 beginning “Kathryn” through Line 17

Page 28 Line 26 beginning “Probably” and ending “Received.”

Page 28 Line 28 beginning “NCC would” through Page 29 Line 3 ending “to perform.”

Page 29 Line 3 beginning “Clearly,” through Line 5 ending “to you.”¹¹

Page 29 Line 18 beginning “She contradicts” through Line 20 ending “Agreement.”

Page 29 Line 21 beginning “Clearly,” through Line 22

Page 20 Line 2 beginning “Dianne” through Line 3 ending “statement.”

Page 32 Line 3 beginning “Miss Allison” through Line 4 ending “McKernan.”

Page 32 Line 13 beginning “, except” through Line 19

E. Inadmissible Materials may not be submitted as the Basis of Expert Opinion.

Unlike lay witnesses, expert witnesses, such as Mr. Dawson, generally are permitted to offer opinion testimony. However, expert witnesses may not submit inadmissible material into evidence as the bases for their expert opinions. For example, while an opinion based in part on hearsay may be admissible (subject to appropriate testing and examination for competence), an exception to the hearsay exclusionary rule does not exist for the admission of hearsay into evidence simply because the hearsay may have formed a basis for the expert opinion. *See generally*, I.L.P. §329.

In this case, Mr. Dawson has testified to a substantial amount of inadmissible hearsay and otherwise inadmissible materials as the bases for his opinions in this proceeding. In particular, as does Mr. Lesser, Mr. Dawson also sets forth numerous allegations against Verizon's affiliates in other jurisdictions and identifies portions of testimony in other state proceedings as the bases for his opinions with regard to Verizon in Illinois. (*See e.g.*, Dawson Direct, p. 8 ln. 9-28, p. 9 ln. 3-18 (setting forth allegations against Verizon's affiliates in other jurisdictions); *Id.*, p. 21, ln.

¹¹ Once again, as with virtually all of Mr. Lesser's “opinions,” Verizon also moves to strike these statements for their pure speculation.

5-28, p. 22, ln. 3-17 (proffering out of state testimonies of Maryland Staff witness Mr. Molnar as Exhibit L and West Virginia Staff witness Mr. Walker as Exhibit M)). As discussed in detail *supra*, such materials are inadmissible and must be excluded even if Mr. Dawson has relied upon them to form his opinions against Verizon in Illinois.

Accordingly, while Verizon moved to exclude the following portions of Mr. Dawson's testimony *supra*, Verizon reiterates that these materials may not be introduced into evidence even if they are the bases of Mr. Dawson's opinions. Verizon respectfully requests that the Commission exclude the following portions of Mr. Dawson's testimony from the record in this proceeding:

DAWSON DIRECT

Page 8 Line 23 through Page 9 Line 16 ending "BellSouth,"

Page 11 Line 19 through Line 25

Page 18 Line 10 beginning "In light" through Line 11 ending "West Virginia,"

Page 20 Line 12 beginning "In light" though Line 13 ending "West Virginia,"

Page 21 Line 5 through Page 22 Line 17

Exhibit L

Exhibit M

DAWSON REBUTTAL

Page 6 Line 17 beginning "One has" through Line 19 ending "customers."

Page 7 Line 9 beginning "He asked" through Line 11 ending "his location."

Pate 7 Line 20 through Page 8 Line 2 ending "states, but"

Page 9 Line 5 beginning "However," through Line 8 ending "this hearing."

F. Speculative Testimony must be stricken.

Testimony that consists solely of speculative views or that are not founded in some factual basis must be excluded. *Marshall v. First Am. Nat. Bank*, 233 N.E.2d 430, 91 Ill.App.2d 27 (1968). The rationale is clear that the purpose of evidentiary hearings is to ascertain the truth of the relevant facts. Speculation, guess-work and non-factual statements, which are by definition unreliable and cannot lead to the ascertainment of the truth, must be excluded. *See Id.* (finding prejudicial error and granting new trial for admission of expert opinion that was deemed speculative).

1. The Alleged Wholesale/Retail Distinction in Verizon's Network is based solely on Speculation.

NCC witness Mr. Dawson attempts to support NCC's position by setting forth a hypothetical theory of how Verizon's physical network developed in Illinois. Mr. Dawson theorizes that a distinction between retail and wholesale facilities developed in Verizon's network prior to the advent of the Telecommunications Act of 1996 ("TA96"), and that Verizon has sought to maintain this alleged distinction in its network facilities subsequent to the enactment of TA96 despite the lack of an engineering need to do so. (*See*, Dawson Direct, pg. 6 ln. 24 through pg. 8 ln. 8). Mr. Dawson has admitted in discovery responses, however, that he has no knowledge of Verizon's physical infrastructure, or the development thereof, in Illinois.

In particular, in VZ-NCC 4.10, Verizon asked Mr. Dawson to identify each and every basis for his assertion that the majority of fiber routes in Verizon's network in Illinois are to locations other than central offices, which assertion is central to Mr. Dawson's theory that a wholesale/retail has arisen as a result of the manner in which Verizon's network in Illinois was developed. Only when compelled to do so by the ALJs following Verizon's Motion to Compel, Mr. Dawson responded that he has "no specific knowledge about the network of Verizon of Illinois." Mr. Dawson's Supplemental Response to VZ-NCC 4.10 is attached hereto as Exhibit

B. In addition, in VZ-NCC 4.11, Verizon also asked Mr. Dawson to identify each and every basis for his assertion that a distinction between "retail" and "wholesale" facilities has developed in Verizon's network in Illinois. Once again, when compelled to do so, Mr. Dawson responded that his assertion is based solely on his "experience in other proceedings about this issue in other states," namely Maryland and West Virginia. (emphasis added). Mr. Dawson's Supplemental Response to VZ-NCC 4.11 is also attached hereto as part of Exhibit B.

While admitting his lack of any knowledge with respect to the development of Verizon's network in Illinois, Mr. Dawson submits that the hearsay testimony of witnesses in out-of-state proceedings is the basis for his statements with respect to Verizon's network in Illinois. In particular, Mr. Dawson relies on hearsay statements regarding networks of Verizon's affiliates in the Eastern part of the United States that were owned by Bell Atlantic during the development of their networks. Verizon Illinois has a distinct history and its network was developed under an entirely different set of influencing factors. Verizon Illinois' physical infrastructure was developed under the ownership and control of GTE Corporation while also being subject to the distinctive influences of the Illinois Commission and more rural environment that characterizes the Western areas of the nation in which GTE Corporation operated.

Based on his own admissions, Mr. Dawson does not have any knowledge of Verizon's network in Illinois or the manner in which the network was developed. More importantly, Mr. Dawson does not have any knowledge whether a distinction between wholesale/resale facilities developed in Verizon Illinois' network. Mr. Dawson's factual assertions about these subjects are, therefore, by his own admissions beyond his personal knowledge, pure speculation and must be stricken.

Verizon respectfully requests that the following portions of Mr. Dawson's testimony be stricken on this basis:

DAWSON DIRECT

Page 6 Line 24 beginning “Before the” through Page 7 Line 15 ending “network when”

Page 7 Line 16 beginning “CLECs are” through Line 21 ending “distinctions.”

Page 7 Line 25 through Line 27

2. No Factual Basis exists for Allegations of an Overarching Delay Tactic.

Mr. Dawson asserts that Verizon’s alleged “policy” of not interconnecting with CLECs on retail facilities is part of an overarching tactic to delay CLEC interconnections. In particular, Mr. Dawson testifies that “[t]his is just one more ‘policy’ in a much larger series of such policies that seem to serve no purpose but to slow CLECs from getting into business.” (Dawson Direct, p. 10, ln. 10-12). Mr. Dawson further asserts that he has “seen a pattern of constantly shifting excuses and policies” in part through his negotiations on behalf of CLECs in West Virginia. (*Id.*, p. 10, ln. 7-10).

Mr. Dawson admits, however, that he has absolutely no factual foundation for his alleged overarching scheme of delay in Illinois. When asked in discovery whether he has participated in any CLEC interconnections in Illinois, Mr. Dawson responded that he has participated in negotiating and implementing two interconnection agreements with Verizon in Illinois. With respect to both of those interconnections, Mr. Dawson further responded (but only when compelled to do so) that (1) he was aware of no action that Verizon took in bad faith, (2) he was aware of no actions that Verizon took in contravention of any applicable legal requirements during either the negotiation or implementation of the interconnections, and (3) he is not aware of any complaints filed against Verizon with respect to either of the interconnections. (*See* Dawson Supplemental Responses to VZ-NCC 4.05, 4.07 and 4.09 attached hereto as Exhibit C).

Given Mr. Dawson's discovery responses submitted under oath, it is clear that Mr. Dawson's personal experiences with Verizon Illinois have not provided a basis for Mr. Dawson's

allegations of an overarching scheme of delay in Illinois. Certainly, NCC's allegations in and of themselves cannot establish the overarching scheme of delay Mr. Dawson alleges to exist. Mr. Dawson's assertions that such a scheme, nonetheless, exists are entirely speculative.

Indeed, the degree of speculation behind Mr. Dawson's allegations is clearly indicated by his word choice when discussing the matter. Rather than employing a term of certainty, such as "is" or "does," Mr. Dawson testifies that Verizon's alleged policy in Illinois "**may** be indicative of internal systems established at Verizon to slow the CLEC process." (Dawson Direct, pg. 14, ln. 26-27). Mr. Dawson's deliberate choice of the word "may," which is a term of uncertainty, demonstrates the speculative nature of Mr. Dawson's testimony on this point.

Furthermore, Mr. Dawson's own testimonial references to other jurisdictions, such as West Virginia, indicate that in the absence of any factual basis for his alleged scheme of delay in Illinois, Mr. Dawson has simply resorted to the allegations advanced against Verizon's affiliates in other jurisdictions as the only basis for his testimony on this point in Illinois.¹² To the extent Mr. Dawson has, in fact, relied solely on such non-jurisdictional allegations, it bears repeating, yet again, that the Commission's jurisdiction is limited to Illinois. It bears further repeating that the West Virginia Commission rejected in total the allegations advanced by Mr. Dawson and others that Verizon's affiliate had the alleged "policy" in that state. Mr. Dawson's allegations of an overarching delay scheme must be excluded because no factual foundation exists to support such allegations against Verizon Illinois.

Verizon respectfully requests that the following portions of Mr. Dawson's testimony be stricken on this basis:

¹² Indeed, Mr. Dawson admitted in his rebuttal testimony that in the quick preparation of his Illinois testimony, several assertions made against Verizon's affiliates in other states were mistakenly included in his Illinois testimony despite the lack of any foundation to support such claims against Verizon Illinois. (Dawson Rebuttal, pg. 10, ln. 1-8). Perhaps this overarching scheme of delay is another area that was neglected during the process of what appears to have been nothing more than the modification of Mr. Dawson's West Virginia testimony for use in Illinois.

DAWSON DIRECT

Page 10 Line 6 through Line 12

Page 14 Line 26 beginning “- and may” through Page 16 Line 11

Page 16 Line 27 beginning “Verizon knows” through Page 17 Line 5

Page 17 Line 14 beginning “I fully” through Line 16 ending “into business.”

3. Mr. Dawson’s Testimony regarding Verizon’s Wireless Interconnections is Pure Conjecture.

Verizon witness Ms. Allison proffered important evidence that Verizon Illinois had performed numerous interconnections on the type of facilities NCC asserts Verizon refuses to interconnect prior to NCC ever approaching Verizon for interconnection in Illinois. (Allison Direct, pg. 4-13, Att. KJA-1). In part, these interconnections have been performed with wireless carriers. (*Id.*, pg. 8-9).

Mr. Dawson, in a desperate attempt to diminish the significance of this evidence, provides a response that is admittedly based 100% in speculation and, ultimately, 100% incorrect. Mr. Dawson testifies to two different means through which wireless carriers’ and ILECs’ networks interact. The first is through interconnections of the exact same type as CLECs and that take place in accordance with interconnection agreements just like CLECs. Mr. Dawson testifies that wireless carriers generally have a handful of these actual interconnections between the wireless carriers’ switches and the ILECs’ networks in any given state, the purpose of which is to exchange traffic. (Dawson Rebuttal, pg. 3, ln., 6-14). On the other hand, Mr. Dawson testifies that wireless carriers maintain hundreds of antenna sites throughout a state, and that wireless carriers purchase T1s from LECs to connect their antenna sites to the LECs’ networks and ultimately the wireless carriers’ own switches (as noted, the wireless carriers’ switches are also connected to the LECs’ networks through actual interconnections). (*Id.*, pg. 3, ln. 15-25).

Mr. Dawson speculates that the interconnections identified to have taken place between Verizon Illinois and wireless carriers in Exhibit KJA-1 are the hundreds of T1 purchases wireless carriers have made from Verizon rather than the actual interconnections between the wireless carriers' switches and Verizon's network. (*Id.*, pg. 3, ln. 1-28, pg. 4, ln. 1-6). The fact that Mr. Dawson is speculating is readily admitted. Mr. Dawson speculates that "most of these locations are **probably** not interconnection points." (*Id.*, pg. 3, ln. 3-4 (emphasis added)). He further admits: "**I have no way of knowing, but I suspect** that most of the locations listed by Ms. Allison as wireless interconnection points are actually locations where wireless carriers are actually purchasing [T1s]." (*Id.*, pg. 3, ln. 26-28 (emphasis added)).

First, Mr. Dawson did have a way of knowing. The information contained in Exhibit KJA-1 was provided to NCC through discovery in this proceeding months ago. NCC has had every opportunity to conduct further discovery to ascertain the nature of the wireless interconnections and, indeed, has conducted a significant amount of further discovery with regard to other matters. The fact that NCC forwent its opportunity to conduct further discovery must not result in NCC being provided more leniency in the manner in which it presents testimony. In other words, NCC should not be permitted to guess simply because NCC has failed to take the readily available and prudent steps necessary to ascertain the underlying truth.

Second, Verizon hereby confirms through this Verified Motion that the interconnections identified in Exhibit KJA-1 to Ms. Allison's testimony are, in fact, actual interconnections with wireless carriers. Indeed, even without such confirmation, a simple examination of the information contained in Exhibit KJA-1 should lead any reasonable person to the conclusion that the information references the handful of actual interconnections each wireless carrier maintains rather than the hundreds of T1s such carriers purchase to connect their antennas to the network.

In particular, following are the wireless carriers identified in Exhibit KJA-1 along with the corresponding number of interconnections shown for each carrier:

Southwestern Bell Mobile	4
Western Wireless	1
US Cellular	4
First Cellular of Southern Ill	3
GTE Wireless	3
Douglas Telecom	2
Sprint PCS	2
Ameritech Mobile	5
360 Communications/Centel Cell	1
Arch Communications	1
Cellular One of Danville	3

Certainly, all of these wireless carriers have a substantially greater number of antennas throughout Verizon's operating territory in Illinois. Given the small number of interconnections identified for each carrier, the interconnections referenced are clearly the handful of each wireless carrier's actual interconnections in Verizon's Illinois territory rather than the hundreds of T1s each carrier purchases. NCC's testimony on this issue must be stricken.

Verizon respectfully requests that the following portions of Mr. Dawson's testimony be stricken on this basis:

DAWSON REBUTTAL

Page 3 Line 1 through Page 4 Line 6

4. Mr. Lesser's Speculation regarding the Knowledge and Actions of Verizon's Employees must be excluded.

Mr. Lesser speculates that Verizon invented the term "dedicated mux" as well as other terms, and used the terms with specified meanings. (Lesser Rebuttal, pg. 3, ln. 16). Similarly, Mr. Lesser engages in pure fantasy when he sets forth (while not possibly having any knowledge of what any other person knows or how another person thinks or handles a situation) what he states Verizon's employees *must have known or would have done*. (See e.g., *Id.*, pg. 8, ln. 11 - pg. 9, ln. 2). Mr. Lesser can have no idea who invented the term "dedicated mux" or any of the

other terms that have been part of the parties' communications with respect to interconnection in Illinois. Nor can Mr. Lesser have any knowledge of what any other person who heard or used the terms understood the terms' meanings to be or what such persons thought and did based on each person's individual understandings of the terms' meanings. Mr. Lesser's statements that Verizon created the terms and used the terms to describe specified facilities, and how Verizon's employees that were responsible for implementing interconnections in Illinois reacted to the use of the terms must be stricken as pure speculation.

This point is important because Mr. Lesser's groundless assumption that Verizon created and applied specified meanings to terms involved in this litigation implies improperly that Verizon's employees responsible for implementing and provisioning NCC's interconnection in Illinois understood the terms' to have the meanings ascribed by Mr. Lesser. While Mr. Lesser and Verizon's affiliates in other jurisdictions may have used these terms to negotiate NCC's interconnections in other states, Mr. Lesser is engaging in pure speculation with regard to the history and use of these terms by Verizon's employees that were responsible for implementing interconnections in Illinois. For example, Mr. Lesser testifies that Verizon witness Mr. Bartholomew "guessed" what was meant by certain terms. Mr. Bartholomew, however, did not testify that he "guessed" but rather than he thought one of the terms meant something different than Mr. Lesser. (*See*, Bartholomew Direct, p. 4, ln. 72). Mr. Lesser has no basis for his assertions, but rather is engaging in pure speculation with regard to the thoughts, actions and knowledge of Verizon's employees.¹³ Mr. Lesser's entirely speculative assertions on these issues must be stricken.

¹³ To the extent Mr. Lesser may assert that his testimony on these issues is based on the testimony of Verizon's witnesses, Mr. Lesser is exceeding his role as a lay witness in this proceeding by testifying to the opinions and conclusions that he has derived (as a biased party in this case) from the testimony submitted into evidence. As explained *supra*, the authority to draw conclusions from the evidence presented into the record is reserved to the finder of fact (in this case the ALJs and the Commission) and such opinions/conclusions may not be testified to by lay witnesses (such as Mr. Lesser).

Verizon respectfully requests that the following portions of Mr. Lesser's testimony be stricken on this basis:

LESSER REBUTTAL

Page 3 Line 15 beginning "I have" through Line 16 ending "invented."

Page 3 Line 17 beginning "They use" through Line 20

Page 7 Line 4 through Line 12

Page 8 Line 11 through Page 9 Line 2

Page 9 Line 9 through Line 19

Page 14 Line 19 beginning and ending with "She knew that"

Page 17 Line 27 through Page 18 Line 4

Page 18 Line 19 beginning "He would have" through Line 20 ending "feasible."

Page 18 Line 23 through Page 19 Line 4

Page 29 Line 3 beginning "Clearly," through Line 5 ending "to you."

Page 29 Line 21 beginning "Clearly," through Line 22

5. Mr. Lesser's Speculation of Third Party Interconnections must be excluded.

As discussed *supra*, Mr. Lesser alleges that certain third party carriers have experienced delays during their interconnections with Verizon in Illinois. (*See*, Lesser Rebuttal, pg. 22-23). Neither NCC nor Mr. Lesser have been involved in Verizon's interconnections with any other carriers, including the two carriers whose interconnections Mr. Lesser asserts to speak with such knowledge. Indeed, while Mr. Lesser alleges these third parties have complaints against Verizon, neither party has filed a complaint. Given Mr. Lesser's complete lack of involvement and participation in these interconnections, and resultant lack of knowledge regarding these interconnections, Mr. Lesser's allegations regarding these interconnections must be stricken as pure speculation.

Verizon respectfully requests that the following portions of Mr. Lesser's testimony be stricken on this basis:

LESSER REBUTTAL

Page 22 Line 18 through Page 23 Line 10

Page 28 Line 26 beginning “Probably” and ending “received.”

Page 28 Line 28 beginning “NCC would” through Page 29 Line 3 ending “to perform.”

6. Other Speculative Testimony must be stricken.

In addition to the categories of speculative testimony addressed above, the following statements, while not falling within any of the enumerated categories, also constitute speculative statements that must be excluded:

LESSER REBUTTAL

Page 24 Line 10 beginning "Although," through Line 13

Page 19 Line 2 through Line 4

G. Testimony regarding Settlement Discussions must not be admitted to the Record.

It is well established that proof of offers to compromise or the fact that an offer to compromise was made is inadmissible. *Sawicki v. Kim*, 445 N.E.2d 63, 112 Ill.App.3d 641 (1983); *Lasswell v. Toledo*, 354 N.E.2d 25, 41 Ill.App.3d 568 (1976). The rule extends to the exclusion of anything that occurred during the negotiations and constituted an inseparable part of the effort to compromise. *American State Bank v. Woodford County*, 371 N.E.2d 232, 55 Ill.App.3d 123 (1977). The rule also excludes offers made before the commencement of litigation. *Cook v. Korshak*, 134 N.E. 49, 301 Ill. 603 (1922).

Despite this established evidentiary rule, Mr. Lesser seeks to submit a substantial amount of testimony concerning what he asserts to be settlement offers and negotiations in West

Virginia.¹⁴ (Lesser Rebuttal, p. 12, ln. 12- 21; p. 12, ln. 26 - p. 14, ln. 4). Mr. Lesser's testimony regarding settlement negotiations must be stricken.

Moreover, the settlement materials Mr. Lesser seeks to introduce pertain to NCC's non-jurisdictional claim against Verizon's out-of-state affiliate in West Virginia. (*See*, Lesser Rebuttal, Exhibits S and T). While Illinois is mentioned briefly in Exhibit S, the reference is not because the settlement negotiations pertained to Illinois, but because NCC was apparently attempting to coerce Verizon's compromise in West Virginia by threatening a law suit in Illinois. (*See, Id.*, Exhibit S). Accordingly, Mr. Lesser's proffered testimony and exhibits pertaining to settlement negotiations should be excluded on the additional ground that such materials pertain to matters that are beyond the Commission's jurisdiction to hear.

Should Mr. Lesser's testimony regarding settlement negotiations, for some reason, not be excluded from the record in this proceeding, Verizon submits that the record should accurately reflect the settlement negotiations that have taken place with respect to Illinois. Apart from NCC's attempt to utilize Illinois as leverage in its West Virginia negotiations, the parties have only engaged in a single round of negotiations that actually pertained to the Illinois. This single set of negotiations was initiated by NCC after Verizon filed its Direct Testimony in this proceeding. Upon receipt of Verizon's Direct Testimony and, apparently, after assessing the substantial evidence of the non-existence of any alleged policy in Illinois contained therein, NCC offered to dismiss its complaint in Illinois. Furthermore, and perhaps even more importantly, NCC's offer was contingent on Verizon admitting that the policy NCC alleges Verizon has in Illinois **does not** exist. NCC's Offer of Settlement is attached hereto as Exhibit D.

¹⁴ Verizon's West Virginia affiliate did not understand NCC's letter proffered as Exhibit T to Mr. Lesser's Rebuttal Testimony to be an offer of settlement. Rather, Verizon considered the letter to be a demand letter. However, given that NCC itself has characterized its letter as a settlement offer and sought to introduce it in Illinois as such, the Commission should treat the ensuing discussions between the parties as settlement discussions for evidentiary purposes, based on NCC's representations.

It is truly novel and unusual to receive an offer for settlement from an opposing party that seeks Verizon's admission that Verizon's position in the litigated matter is true and correct. Regardless of whether Mr. Lesser's proffered testimony regarding the West Virginia settlement negotiations is introduced, NCC's offer for settlement in Illinois should be introduced as an admission in this proceeding. Where a statement or admission is made independently of the concessions involved in a proposed compromise, and purports to be true rather than hypothetical, the admission is admissible into evidence. *Steiner v. Rig-A-Jig Co.*, 135 N.E.2d 166, 10 Ill.App.2d 410 (1956). NCC's offer to settle on grounds that are contrary to its allegations of a policy in Illinois, and instead are adoptive of Verizon's position, cannot be part of a proposed compromise. Such a statement, rather, purport to be the truth. *See, Lipschultz v. So-Jess Management Corp.*, 232 N.E.2d 485, 89 Ill.App.2d 192 (1967)(letters containing statement of lessee which were inconsistent with lessee's claim of constructive eviction were admissible). Accordingly, Verizon hereby seeks as additional relief under this Verified Motion the admission of NCC's offer of settlement in Illinois dated April 9, 2003. The authenticity of the offer of settlement is verified by Verified Motion.

Finally, it is important to recognize that NCC has maintained this Illinois litigation despite NCC's own apparent belief that Verizon Illinois does not have the policy NCC alleges. NCC's own admission that Verizon Illinois does not have the alleged policy establishes that NCC is maintaining a frivolous Complaint. As can be seen from NCC's Offer of Settlement, NCC has used this litigation, once again, as leverage. NCC seeks to obtain a substantial sum of money (approximately \$115,000 at the time the offer of settlement was made) as attorneys fees despite the frivolous nature of its Complaint. It can be certain that NCC's claim for attorneys fees will rise substantially by the time this case is fully litigated. NCC should not be permitted to

utilize frivolous litigation as a means of leveraging substantial monetary payouts in the form of attorneys fees.

Verizon respectfully requests that NCC's Offer of Settlement in Illinois be introduced as an admission, and that the following portions of Mr. Lesser's testimony regarding West Virginia settlement negotiations be stricken:

LESSER REBUTTAL

Page 12 Line 12 through Line 21

Page 12 Line 26 through Page 14 Line 4

Page 26 Line 25 beginning "Verizon's" through Line 28 ending "dedicated MUX."

Page 32 Line 16 beginning "It is also" through Line 18 ending "letter."

Exhibit S

Exhibit T

H. Testimony that Mr. Dawson admitted was improperly filed should be stricken.

Verizon witness Ms. Allison noted in her Direct Testimony that Mr. Dawson had included several matters that appear to be entirely unrelated to Verizon Illinois but rather pertain solely to NCC's assertions against Verizon's affiliate in West Virginia -- namely, the allegations that Verizon told NCC a new multiplexer would need to be built for interconnection in Illinois, and that Verizon refused NCC's request to partially complete its interconnection in Illinois. (Allison Direct, pp. 49-50). With respect to allegation that Verizon told NCC a new multiplexer would have to be built before NCC could interconnect in Illinois, Ms. Allison pointed out that just the opposite was true. Verizon Illinois specifically informed NCC soon after NCC's initial contact in Illinois that Verizon Illinois does not require a fiber build to interconnect. (*Id.*, p. 49 (*citing* Att. DMM-2)). Also, with respect to the assertion that Verizon refused to partially

complete NCC's interconnection, Ms. Allison noted that NCC did not request a partial completion of its interconnection in Illinois. (*Id.*, pp. 49-50).

Mr. Dawson admitted in his Rebuttal Testimony that both of the assertions identified by Ms. Allison pertained to NCC's allegations in a different state. Mr. Dawson explained that in his rush to prepare something to file in Illinois, matters that relate to Verizon's West Virginia affiliates were improperly left in his Illinois testimony. (Dawson Rebuttal, pg. 10). While all parties agree that these assertions do not pertain to Verizon Illinois, the inclusion of the assertions in Mr. Dawson's testimony will confuse the issues and create the risk of undue prejudice. Accordingly, the portions of Mr. Dawson's testimony that address these assertions should be stricken.

Verizon respectfully requests that the following portions of Mr. Dawson's testimony be stricken on this basis:

DAWSON DIRECT

Page 10 Line 23 through Line 27 ending "'policy.'"

Page 13 Line 25 through Page 14 Line 11 ending "very quickly."

Page 14 Line 13 beginning "Verizon's" and ending "the [sic] Illinois."

Page 20 Line 12 beginning "it is hard" through Line 14 ending "fiber build."

III.
Conclusion

WHEREFORE, for each and all of the foregoing reasons, Verizon respectfully requests that the portions of NCC's testimony identified herein be stricken, that NCC be required to submit revised testimony that redacts those portions of its pre-filed testimony excluded pursuant to this Motion, that NCC's Offer of Settlement to Verizon in Illinois dated April 9, 2003 attached hereto as Exhibit D be introduced into the record as an admission, and for any and all other appropriate relief.

Dated: October 10, 2003

Respectfully submitted,

VERIZON NORTH INC. AND
VERIZON SOUTH INC.

By: _____
One of their attorneys

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CERTIFICATE OF SERVICE

I, Sarah A. Naumer, hereby certify that I served copies of the Motion to Strike of Verizon North Inc. and Verizon South Inc. to the service list in Docket No. 02-0147 by email on October 10, 2003.

Sarah A. Naumer